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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 787

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION,
Petitioner,

vs.

MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, JOHN PETER CHRISTENSEN, ANNA CHRISTENSEN, JOHN H. BUSCH, JR., PETER VISSER and WILLIAM STERNBERG,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

O. JOHN ROGGE,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Ohio National Life Insurance Company, an Ohio corporation, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, reversing a judgment of the District Court of the United States for the Northern District of Illinois.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 107-118) is reported in 116 F. (2d) 113 and that of the District Court (R. 80-92) in 32 F. Supp. 152.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on November 28, 1940 (R. 118, 119). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925. See also Rule 38 (5) (b) of this Court.

QUESTIONS PRESENTED.

1. Whether an Ohio life insurance company which is prohibited by statute from taking risks other than those connected with life insurance may nevertheless assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, attaching to the stock of an Illinois bank.

2. Whether an Ohio life insurance company which is prohibited by statute from acquiring bank stock may nevertheless assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, attaching to the stock of an Illinois bank.

3. If an Ohio life insurance company may assume such a liability, whether it can do so by a re-insurance agreement which was never authorized or approved as required by statute. Incidental questions are whether the statute is mandatory and whether it is subject to administrative construction.

STATUTES INVOLVED.

Various sections of the Ohio General Code, as amended by laws enacted in 1913 and 1925, are pertinent. Section 9357 provides, in part:

"A company organized under the laws of this state may invest its accumulations as follows:

1. In the United States, state, county, school, or city bonds, or farm loan bonds * * *.

2. In bonds and mortgages upon unincumbered real estate * * *, and in bonds and mortgages upon leasehold estates on real estate for ninety-nine years renewable forever * * *.

3. In loans upon the pledge of such bonds or mortgages * * *.

4. In loans upon its own policies * * *."

Section 9385, so far as pertinent, provides:

"No company, organized under the laws of this state, shall undertake any business or risk, except as herein provided, and no company, partnership or association, organized or incorporated by act of congress, or under the laws of this or any other state of the United States, or by any foreign government, transacting the business of life insurance in this state, shall be permitted or allowed to take any kind of risks, except those connected with, or appertaining to making insurance on life or against accidents to persons, or sickness, temporary or permanent physical disability, and granting, purchasing and disposing of annuities; * * *."

Section 9351 provides:

"No company organized under the laws of this State to do the business of life, accident or health insurance, either on stock, mutual, stipulated premium or assessment plan, shall consolidate with any other company, or reinsure its risks, or any part thereof with any other company, or assume or reinsure the whole of or any portion of the risks of any other company, except as hereinafter provided. Nothing herein contained shall prevent any such company from reinsuring a fractional part of any individual risk, not exceeding

four-fifths thereof, in a company duly authorized to transact business in this state, or with the permission of the superintendent of insurance, the whole of such risk; but no company, except as hereinafter provided, shall reinsure any part of any of its risks when the aggregate amount of its risks reinsured shall equal fifty per cent. of its total insurance in force."

Section 9352 provides:

"When any such company proposes to consolidate with any other company, or enter into any contract of reinsurance, it shall present its petition to the superintendent of insurance, setting forth the terms and conditions of the proposed consolidation or reinsurance, and praying for the approval or of any modification thereof, which the commission hereinafter provided for may approve."

Section 9353 provides:

"The superintendent thereupon shall issue an order of notice, requiring notice to be given by mail to the policy-holders of such company, of the pendency of such petition, and the time and place at which it will be heard, and the publication of the order of notice and petition, in five daily newspapers to be designated by him, at least one of which shall be published in the city of Columbus, for at least two weeks before the time appointed for the hearing on the petition."

Section 9354 provides:

"The governor or in the event of his inability to act, some competent person resident of the state to be appointed by him, the attorney general, and the superintendent of insurance, shall constitute a commission to hear and determine upon such petition. At the time and place fixed in such notice, or at such time and place as is fixed by adjournment, the commission shall proceed with the hearing and may make such examination into the affairs and condition of the company as it may deem proper. The superintendent of insurance may summon and compel the attendance and testimony of witnesses and the production of books and papers before the commission. Any policy-holder or stockholder of the above named company or companies may appear and be heard in reference to such petition."

Section 9355 provides:

> "If satisfied that the interests of the policy-holders of such company or companies are properly protected, and that no reasonable objection exists thereto, the commission may approve and authorize the proposed consolidation or reinsurance, or of such modification thereof as seems to it best for the interests of the policy-holders, and make such order with reference to the distribution and disposition of the surplus assets of any such company thereafter remaining, as shall be just and equitable. Such consolidation or reinsurance shall only be approved by the consent of all the members of the commission, whose duty it will be to guard the interests of the policy-holders of any such company or companies proposing to consolidate or reinsure."

STATEMENT.

On July 6, 1931, this suit was filed in the State Court of Illinois as a class suit in equity by creditors of The Roseland State Savings Bank, an Illinois bank, to enforce the super-added liability of its stockholders (R. 7-31, 67). On July 3, 1935, almost four years later, petitioner was joined as a defendant and thereafter removed the separable controversy as to it to the Federal Court (R. 2-6, 67). On January 29, 1940, more than eight and one-half years after the commencement of this suit, petitioner moved for summary judgment. This motion was granted by the District Court. The respondents appealed to the Circuit Court of Appeals for the Seventh Circuit and that Court reversed the judgment of the District Court.

Petitioner did not own, either of record or beneficially, any of the stock of The Roseland State Savings Bank on account of which liability is asserted against it herein (R. 109, 110, 67, 32-34). The American Old Line Insurance Company, an Illinois corporation (R. 107) was the owner of that stock (R. 3, 108). Petitioner was joined as a de-

fendant because it had agreed to reinsure the risks of the American Old Line Insurance Company (R. 3-6).

The re-insurance agreement between American Old Line Insurance Company and petitioner was entered into on November 19, 1930 (R. 34). Pursuant to that agreement petitioner, on January 8, 1931, assumed the risks of the American Old Line Insurance Company and took over its assets with the exception of four items totaling $607,030 (R. 109, 32). These four items were corporate stocks valued at $382,030, real estate valued at $50,000, a collateral note in the face amount of $25,000, and government bonds in the face amount of $150,000; and, according to the re-insurance agreement, constituted part payment of the purchase price of $1,388,750 to be paid by petitioner (R. 109, 110, 32, 33). Included in the first item was the stock in question of The Roseland State Savings Bank (R. 110). The difference between the $607,030 in assets retained and the stated purchase price of $1,388,750, amounting to $781,720, petitioner paid to American Old Line Insurance Company in cash (R. 110).

By the re-insurance agreement petitioner assumed and agreed to discharge all of the "contracts * * * and liabilities" of the American Old Line Insurance Company (R. 32), and the latter guaranteed and warranted "the genuineness and accuracy of its records and books of account as of October 31, 1930, in reliance upon which this agreement is made" (R. 33).

The stock in question of the bank carried a possible liability of $139,800 (R. 110). The bank, however, did not cease to do business until July 6, 1931 (R. 9), the day this suit was filed. Until that date, more than eight months after October 31, 1930, specified in the re-insurance agreement, and almost six months after petitioner in fact took over the risks of the American Old Line Insurance Com-

pany, the liability of $139,800 remained contingent in incidence and uncertain as to amount.

Section 9357 of the Ohio General Code, as amended by laws enacted in 1913 and 1925 prohibited petitioner from acquiring stocks of any kind, let alone bank stock carrying a super-added liability[1] (See R. 116). Section 9385 prohibited petitioner from taking any kind of risks except those connected with life or related insurance (See R. 116).

Section 9351 *expressly* prohibited petitioner from reinsuring all the risks of another company except as provided in subsequent sections. Section 9352 required petitioner to file with the Superintendent of Insurance of the State of Ohio a petition setting forth the terms and conditions of the proposed re-insurance agreement and praying for its approval. Section 9353 required the Superintendent of Insurance to give notice by mail of the pendency of the petition to the policy holders of petitioner, and to publish the notice and petition to five daily newspapers to be designated by him. Section 9354 provided for a

1. Since Section 9357 enumerates the investments which petitioner may make, a prohibition is implied against making any other investments. *Robotham* v. *Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842; *North River Ins. Co.* v. *Lawrence*, 3 Wend. (N. Y.) 482, 483; *New York Firemen Ins. Co.* v. *Ely*, 2 Cow. (N. Y.) 678, 699. Compare *First National Bank* v. *Converse*, 200 U. S. 425 (implied prohibition against acquisition of stock by a national bank); *Concord First National Bank* v. *Hawkins*, 174 U. S. 364 (*id.*); *California Bank* v. *Kennedy*, 167 U. S. 362 (*id.*); *Shaw* v. *National German-American Bank*, 199 U. S. 603, affirming 132 Fed. 658 (C. C. A. 8th); (*id.*); *Bates* v. *Atlantic National Bank of Jacksonville*, 101 F. (2d) 278 (C. C. A. 5th) (*id.*); *Reconstruction Finance Corporation* v. *Rawlings*, 76 F. (2d) 566 (C. C. A. 5th) implied prohibition against acquisition of stock by a state bank; *Schofield* v. *Goodrich Bros. Banking Co.*, 98 Fed. 271 (C. C. A. 8th) (*id.*); compare further *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245 (p. 253 "National banks lack power to pledge their assets to secure a private deposit. The measure of

commission of three, to be composed of the Governor of the State or, in the event of his inability to act, some competent person resident in the State to be appointed by him, the Attorney General and the Superintendent of Insurance. Section 9354 further provided that this commission should hold a hearing, at which hearing any policy holder of petitioner could appear and be heard with reference to the petition. Section 9355 provided that the commission, if satisfied that the interests of the policy holders of petitioner are properly protected, "may approve and authorize the proposed * * * reinsurance." The last sentence of this section provided: "Such consolidation or reinsurance *shall only* be approved by the consent of *all* the members of the commission, whose duty it will be to guard the interests of the policy holders of any such company or companies proposing to consolidate or reinsure." (Italics supplied.)

Petitioner filed its petition with the Superintendent of Insurance of the State of Ohio praying for approval of the proposed re-insurance agreement (R. 110). The Super-

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their powers is the statutory grant; and powers not conferred by Congress are denied."); *City of Marion* v. *Sneeden*, 291 U. S. 262 (*id.*); *Yonkers* v. *Downey*, 309 U. S. 590, petition for rehearing denied, 310 U. S. 656 (*id.*); *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *Continental National Bank* v. *Peoples Bank*, 366 Ill. 366 (p. 375 "If a power claimed is withheld, the withholding is to be regarded as a prohibition against its exercise."); *People* v. *Wiersema State Bank*, 361 Ill. 75 (implied prohibition against a pledge of assets by a state bank to secure deposits); *Knass* v. *Madison and Kedzie Bank*, 354 Ill. 554 (implied prohibition against agreement by a state bank to repurchase real estate mortgage bonds sold by it); *Calumet, etc. Dock Co.* v. *Conkling*, 273 Ill. 318; *People* v. *Chicago Gas Trust Co.*, 130 Ill. 268. See also *National Bank* v. *Matthews*, 98 U. S. 621, 625; *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 128; *Ulmer* v. *Fulton*, 129 Oh. St. 323; *Gress* v. *Ft. Laramie*, 100 Oh. St. 35; *Norwood Sash & Door Manufacturing Co.* v. *Logsdon*, 65 Oh. App. 254; *Gardner* v. *Johns*, 64 Oh. App. 229.

intendent of Insurance, however, contrary to Section 9353, gave no notice (R. 110, 111, 75, 76). The commission, contrary to Section 9354, did not meet (R. 111, 75, 76), nor did the commission approve or authorize the re-insurance agreement as required by Section 9355 (R. 75, 76). Policy holders of petitioners were not afforded the quasi judicial protection of notice, hearing and adjudication. The Superintendent of Insurance assumed to approve the re-insurance agreement without notice, without a convening of the commission, without a hearing and without approval by all the members of the commission, contrary to the express provisions of Sections 9353, 9354 and 9355.

The record contains only five other specific instances in which the Ohio insurance authorities failed to comply with the provisions of these sections (R. 77, 78). No showing was made of any uniform or long continued non-observance of these statutory provisions (See R. 56, 57). On the contrary, when petitioner, shortly after the re-insurance agreement here involved, re-insured the risks of the Omaha Life of Omaha, Nebraska, the Ohio insurance authorities strictly complied with these provisions and the commission provided for in Section 9354 approved and authorized that re-insurance agreement as required by Section 9355 (R. 57).

Petitioner contends (1) that it did not agree to pay or assume the payment of the super-added stockholder's liability attaching to the shares of stock of The Roseland State Savings Bank which were owned by the American Old Line Insurance Company and were retained by it; (2) that it had no power to assume any such liability, contingent in incidence and uncertain as to amount, because petitioner was prohibited by statute from taking any risks unrelated to life insurance and was forbidden to acquire bank stock; and (3) that even if petitioner attempted to do so, it was without power to assume any such liability by an agreement which was not approved or authorized

as required by statute. The Circuit Court of Appeals left open the first contention (R. 116, 118), because it was not raised in petitioner's motion for a summary judgment (R. 112) and was not disposed of by the District Court (R. 118), and overruled the other two.

In overruling petitioner's second contention, the Circuit Court of Appeals assimilated an agreement to pay a liability contingent in incidence and uncertain as to amount to an agreement to pay a liability certain in amount and definitely accruing (R. 117). In overruling petitioner's third contention, the Circuit Court of Appeals reached the conclusion that Sections 9353, 9354 and 9355 were rendered ambiguous by the provision in Section 9351 excepting from the procedure prescribed by those sections a re-insurance of a fractional part of a single risk (R. 114, 115), and then resorted to the doctrine of administrative construction of a statute (R. 115, 116).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that petitioner had power to assume a super-added stockholder's liability contingent in incidence and uncertain as to amount, contrary to the provisions of Section 9385 prohibiting petitioner from taking any kind of risks unrelated to life insurance.

2. In holding that petitioner had power to assume a super-added stockholder's liability contingent in incidence and uncertain as to amount, contrary to the provisions of Section 9357 prohibiting petitioner from acquiring stock.

3. In holding that petitioner had power to assume a super-added stockholder's liability contingent in incidence and uncertain as to amount by a re-insurance agreement which was never authorized and approved as required by Section 9355.

4. In holding that Sections 9353, 9354 and 9355 were rendered ambiguous by Section 9351 and that administrative construction was applicable and controlling.

5. In holding that Sections 9353, 9354 and 9355 were not mandatory.

6. In failing to follow local statutes and applicable local decisions.

7. In failing to follow principles established by decisions of this Court.

8. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

(1) The Circuit Court of Appeals, in holding that petitioner had power to assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, decided an important question of law in a way in conflict with the provisions of Section 9385, in conflict with applicable local decisions and in conflict with principles established by decisions of this Court.

To protect the investments of millions of policy holders of insurance companies, many states have enacted statutes similar to the Ohio statutes here involved. Such statutes closely limit the investments and assumptions of risks which insurance companies may make and carefully specify the steps to be taken in effecting re-insurance, in order to prevent assumptions of risks which would tend to jeopardize the investments of policy holders.

The Ohio statutes sought to protect policy holders from the dangers inherent in assumptions of vicarious liabilities by prohibiting life insurance companies from owning corporate stock or assuming any risk not pertaining to life insurance, and from dangers inherent in wholesale re-insurance by requiring notice, hearing, adjudication, ap-

proval and authorization by a quasi judicial commission composed of three responsible state officials.

Section 9385 specifically prohibited petitioner from taking any kind of risks except those connected with life or related insurance. The provisions of this section included the super-added stockholder's liability involved in this case, for that liability at the time of the reinsurance agreement was contingent in incidence and uncertain as to amount. It was precisely the kind of contingent, uncertain, unknown risk against which the Ohio statutes sought to protect the investments of policy holders of insurance companies.

Just as the depositors and stockholders of banks—and even the stockholders of ordinary commercial corporations —are protected against super-added stockholder's liability if the courts find either an implied or an express prohibition against the acquisition of stock, *First National Bank* v. *Converse*, 200 U. S. 425 (national bank protected against stockholder's liability as a result of an implied prohibition against acquisition of stock), *Concord First National Bank* v. *Hawkins*, 174 U. S. 364 (*id.*), *California Bank* v. *Kennedy*, 167 U. S. 362 (*id.*), *Shaw* v. *National German-American Bank*, 199 U. S. 603, affirming 132 Fed. 658 (C. C. A. 8th) (*id.*), *Bates* v. *Atlantic National Bank of Jacksonville*, 101 F. (2d) 278 (C. C. A. 5th) (*id.*), *Reconstruction Finance Corporation* v. *Rawlings*, 76 F. (2d) 566 (C. C. A. 5th) (state bank protected against stockholder's liability as a result of an implied prohibition against acquisition of stock), *Schofield* v. *Goodrich Bros. Banking Co.*, 98 Fed. 271 (C. C. A. 8th) (*id.*) *Golden* v. *Cervenka*, 278 Ill. 409 (commercial corporation protected against stockholder's liability because of a prohibition against acquisition of stock), so should the policy holders of insurance companies be protected against contingent, uncertain risks of unknown quantum. The same principle which protects the depositors and stockholders of banks by striking down

agreements on the part of such institutions to repurchase bonds sold by them, *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209 (national bank), *Kimen* v. *Atlas Exchange Bank*, 295 U. S. 215 (*id.*) *Knass* v. *Madison & Kedzie Bank*, 354 Ill. 554 (state bank)[2], should protect the policy holders of insurance companies against contingent hazards outside of the business of insurance.

Specifically, policy holders of petitioner, because of the prohibition in Section 9385 against the assumption of risks unrelated to the business of insurance, should be protected against the stockholder's liability asserted in this case—a liability which, at the time of the alleged assumption, was as contingent in incidence and as uncertain in amount as any risk could be.

In the *Awotin* case, this Court, speaking through Mr. Justice Stone, said, at p. 214:

> "* * * National banks are public institutions and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them. Such a construction of the statute is inadmissible."

It is likewise true that insurance companies are public institutions, that the purpose of the Ohio statutes was to protect policy holders, stockholders and the public from the hazards of contingent liabilities, and that the prohibition against assuming unauthorized risks would be nulli-

2. See also *Ulmer* v. *Fulton*, 129 Oh. St. 323; *Gress* v. *Laramie*, 100 Oh. St. 35; *Norwood Sash & Door Manufacturing Co.* v. *Logsdon*, 65 Oh. App. 254; *Gardner* v. *Johns*, 64 Oh. App. 229. But compare *Hackett* v. *Kripke*, 62 Oh. App. 89.

fied if the stockholder's liability alleged in this case could be enforced against petitioner.

To sustain the prohibition contained in Section 9385 against risks unrelated to insurance and to give effect to the policy behind that section of protecting the investments of policy holders by preventing the funds of insurance companies from being subjected to unusual and abnormal risks, works no hardship upon the respondents herein. They were not parties to the reinsurance agreement and gave no part of the consideration therefor. They placed no reliance upon the agreement and were not misled by it. They have no equity superior to the rights of persons whom the statutes of Ohio sought to protect. At best, their claim is only a bit of "legal grace" which they "fortuitously discovered" and for which they gave nothing. *First Carolinas Joint Stock Land Bank* v. *Page*, 206 N. C. 18, 123; 173 S. E. 312, 315.

As a matter of fact, petitioner never assumed the stockholder's liability asserted against it herein. At the time of the reinsurance agreement, November 19, 1930 (R. 34), and at the time petitioner took over the risks of the American Old Line Insurance Company, January 8, 1931 (R. 109), The Roseland State Savings Bank was an open going concern and remained so until July 6, 1931 (R. 9). In November 1930, when the agreement was made, and in January 1931, when it was consummated, no one had any thought of stockholder's liability. Petitioner took over the liabilities of American Old Line Insurance Company as shown on its books and American Old Line Insurance Company warranted the genuineness and accuracy of its books (R. 33), and that was that.

That the parties did not intend petitioner to assume the liability herein asserted is evident from the fact that no attempt was made to transfer the bank stock to petitioner. The contract expressly provided that all stock should remain with the American Old Line Insurance Company,

together with other property which, with the bank stock, had a face value of $607,030 (R. 110, 32). In addition, petitioner paid American Old Line Insurance Company cash in the amount of $781,720 (R. 110). But even if petitioner had attempted to assume the liability asserted against it, the Circuit Court of Appeals, in accordance with the provisions of, and policy behind, Section 9385, in accordance with applicable local decisions and in accordance with principles established by decisions of this Court, should have held petitioner without power to assume any such contingent, uncertain and unknown liability wholly unrelated to the insurance business.

The Circuit Court of Appeals, however, assimilated this contingent and uncertain liability of unknown quantum to the assumption of a liability certain in amount and definitely accruing (R. 117), thus depriving the policy holders of petitioner of the very protection which Section 9385 was intended to give them. In so doing, the Circuit Court of Appeals decided an important question of law in a way in conflict with the provisions of Section 9385, contrary to the requirement of Section 34 of the Judiciary Act of 1789 and in conflict with applicable local decisions, contrary to the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

The Circuit Court of Appeals also failed to follow the principles established by such decisions of this Court as *First National Bank* v. *Converse, supra, California Bank* v. *Kennedy, supra,* and *Awotin* v. *Atlas Exchange Bank, supra.* This is an additional ground for granting the writ herein. *San Giorgio I* v. *Rheinstrom Co.*, 294 U. S. 494, 496. See also *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 356.

(2) The Circuit Court of Appeals, in holding that petitioner had power to assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, decided an important question of law in a way in conflict with the provisions of Section 9357, in conflict with applicable local decisions and in conflict with principles established by decisions of this Court.

As an additional protection to the investments of policy holders of Ohio insurance companies, Section 9357 in effect prohibited Ohio insurance companies from investing in stocks of any kind, let alone bank stocks carrying a super-added liability. In order to give effect to the prohibition contained in this section and to carry out the policy behind it, the Circuit Court of Appeals should have held that petitioner was without power to assume a hazardous, uncertain and contingent liability. *First National Bank* v. *Converse, supra; Concord First National Bank* v. *Hawkins, supra; California Bank* v. *Kennedy, supra; Shaw* v. *National German-American Bank, supra; Bates* v. *Atlantic National Bank of Jacksonville, supra; Reconstruction Finance Corporation* v. *Rawlings, supra; Schofield* v. *Goodrich Bros. Banking Co., supra; Golden* v. *Cervenka, supra.* Compare *Awotin* v. *Atlas Exchange Bank, supra; Kimen* v. *Atlas Exchange Bank, supra; Knass* v. *Madison & Kedzie Bank, supra.* In reaching an opposite conclusion the Circuit Court of Appeals decided an important question of law in conflict with the prohibition contained in Section 9357 contrary to the requirement of Section 34 of the Judiciary Act of 1789, failed to apply applicable local decisions as required by the decision of this Court in *Erie Railroad Co.* v. *Tompkins, supra,* and failed to follow principles established by decisions of this Court as required by *San Giorgio I* v. *Rheinstrom Co., supra.*

(3) The Circuit Court of Appeals, in deciding that petitioner had power to assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, by a re-insurance agreement which was never approved or authorized as required by Sections 9353, 9354 and 9355, decided an important question of local law in a way in conflict with the provisions of these sections and in conflict with applicable local decisions.

For the further protection of the investments of policy holders of Ohio insurance companies, Ohio law expressly required notice and a hearing, adjudication and approval by a full commission of three responsible state officials before an Ohio life insurance company could re-insure all the risks of another company. Section 9353 provided for notice to policy holders; Section 9354 provided for a commission of three responsible state officials to pass on applications for re-insurance and for a hearing at which policy holders or stockholders might appear and be heard; and Section 9355 provided for approval and authorization by the commission. Section 9355 leaves no doubt but that these statutory provisions are mandatory and that they were intended to protect policy holders. This section specifically requires that "re-insurance *shall only* be approved by the consent of *all* members of the commission, whose duty it will be to guard the interests of the policy holders." (Italics supplied.)

These statutory provisions were ignored in the case of the re-insurance agreement here involved (R. 75, 76). Accordingly, the Circuit Court of Appeals should have held that petitioner was without power to assume a hazardous, uncertain, stockholder's liability by such an agreement. Compare *Continental National Bank* v. *Peoples Bank*, 366 Ill. 366; *Goodall, et al.* v. *Cook, et al.*, 203 Ill. App. 69.

In *Continental National Bank* v. *Peoples Bank*, one bank

assumed the deposits of another and upon the insolvency of the latter sought to enforce the super-added liability of its stockholders. The court held that the alleged assumption agreement was void and that no recovery could be had thereon because it had not been approved by the Auditor of Public Accounts as required by statute.

In the *Goodall* case, the court held that an insurance company and its officers had no power to execute a reinsurance agreement without the approval of its stockholders as prescribed by statute. The court said, at p. 74:

> "We are therefore of the opinion that appellees, as officers and directors of the Bankers Accident Insurance Company, had no power or authority to transfer the risks covered by this association or to effect a reinsurance of the members of said association in any other organization. Such transfer could only be effected in the manner provided by statute, and the efforts of appellees to effect such transfer without submitting the same to a vote of the members of said association would be ineffectual. * * *"

To the same effect are *Iowa Life Ins. Co.* v. *Eastern Mutual Life Ins. Co.*, 64 N. J. L. 340, 342, 45 Atl. 762, 763; *Federal Life Ins. Co.* v. *Barnett*, 71 Ind. App. 613, 636, 125 N. E. 522, 529.

The Circuit Court of Appeals did not discuss or distinguish these cases. It cited no contrary decisions, and diligent search has disclosed none. Indeed, the Circuit Court of Appeals indicated upon oral argument that it considered itself *not* bound to follow the case of *Continental National Bank* v. *Peoples Bank*. It is submitted that the Court was bound to follow this decision (*Fidelity Union Trust Co.* v. *Field*, 85 L. Ed. 176, 179), and the decision in the *Goodall* case, which would have been controlling in the State Court. *West* v. *American Telephone and Telegraph Co.*, 85 L. Ed. 146.

The Circuit Court of Appeals felt that the plain provisions of Sections 9353, 9354 and 9355 were rendered doubt-

ful by the provisions of Section 9351 (R. 114, 115). But these sections are not ambiguous, whether taken singly or together. Sections 9353, 9354 and 9355 provide a procedure to be followed when it is proposed to re-insure *all* of the risks of another company as is the case here. Section 9351 excepts from this procedure a re-insurance of a fractional part of a single risk.

Since these statutory provisions are unambiguous, the doctrine of administration construction has no application. *People* v. *Shedd*, 241 Ill. 155, 167-8, 89 N. E. 332; *Lee* v. *Sturgis*, 46 Oh. St. 153, 19 N. E. 560; *U. S.* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 277, 280; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 759; NOTE, 73 L. Ed. 339.

Even were this not true, the inaction of the Ohio Commission furnished no guide to construction since its practice was not uniform (*McCann* v. *Retirement Board*, 331 Ill. 193, 202, 162 N. E. 859; *U. S.* v. *Missouri Pac. R. R. Co.*, 278 U. S. 269, 280), and was not long continued. *Barrett* v. *Reuter*, 289 Ill. App. 221, 230, 7 N. E. (2d) 74; *State* v. *Brown*, 121 Oh. St. 73, 166 N. E. 903, 904; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 759.

Moreover, the failure of the Commission to act in some cases cannot nullify or change the clear requirements of the statute. *People* v. *Whittemore*, 253 Ill. 378, 384, 97 N. E. 683; *People* v. *Russell*, 245 Ill. 268, 278, 91 N. E. 1075; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 759. Administration officials have no power to waive express provisions for regulatory action. *Golden* v. *Cervenka*, 278 Ill. 409, 430, 116 N. E. 273; *State* v. *Mutual Life Ins. Co.*, 175 Ind. 59, 81, 93 N. E. 213.

Sections 9351, 9353, 9354 and 9355 are not only unambiguous; they are mandatory. Compare *State* v. *Board of Education*, 95 Oh. St. 367, 373, 116 N. E. 516; *Downing* v. *Downing*, 24 Oh. N. P. N. S. 241, 254, 255; *Binder* v. *Langhorst*, 234 Ill. 583, 587, 85 N. E. 400; *Hughes* v. *The*

People, 111 Ill. 457; *Board of Supervisors* v. *United States,* 71 U. S. 435, 446.

In the *Hughes* case the court held that a statute requiring court approval of investments by guardians was mandatory, saying, at p. 461:

> "The legislature, in adopting our statute requiring the approval of the county court to loans made by guardians on real estate security, was evidently intending to give additional protection to the estates of infants, and this intention on the part of the legislature can only be given effect by holding * * * that the act is mandatory. To hold otherwise would leave the law practically as it was before. The guardian, under such construction, might obtain the approval of the county court of such loans, or not, just as he saw fit, which would make the statute practically a dead letter."

That decision is applicable here. The Ohio statute was designed to protect policy holders from improvident re-insurance. The prescribed approval by a full commission reflects legislative intent to insist upon that protection. The decision of the Circuit Court of Appeals completely defeats this intent.

It is respectfully submitted that this case calls for the exercise of the supervisory powers of this court in order that the important question of the effect of regulatory insurance and re-insurance statutes designed to protect policy investors may be settled in the federal courts in conformity with uniform state decisions. This can be accomplished only by awarding a Writ of Certiorari herein and reversing the decision of the Circuit Court of Appeals.

THE OHIO NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

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